

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

Docket No. 158,087

## ORDER

**ON** the 20th day of January, 1994, the application of the claimant for review by the Workers Compensation Appeals Board of an Award entered by Administrative Law Judge Robert H. Foerschler on November 17, 1993, and the Award Nunc Pro Tunc entered by Administrative Law Judge Robert H. Foerschler on December 6, 1993, came on for oral argument by telephone conference.

## APPEARANCES

The claimant appeared by and through her attorney, John G. O'Connor of Kansas City, Kansas. The respondent and its insurance carrier appeared by and through their attorney, Kip A. Kubin of Overland Park, Kansas. There were no other appearances.

# RECORD

The record considered by the Appeals Board is the same as that set forth in the November 17, 1993, Award of Administrative Law Judge Robert H. Foerschler. That itemization of the record is hereby adopted by the Appeals Board as if specifically set forth herein.

## STIPULATIONS

The stipulations are hereby adopted by the Appeals Board as specifically set forth in the Award of Administrative Law Judge Robert H. Foerschler.

**ISSUES**

The sole issue presented and argued to the Appeals Board concerns the nature and extent of claimant's disability. Specifically, at issue is whether claimant is entitled to a work disability in excess of the functional rating and, if so, what that work disability should be. Therefore, nature and extent of disability will be the only issue discussed herein. For purposes of this appeal, the Appeals Board adopts the findings made by the Administrative Law Judge regarding those other issues not stipulated to at regular hearing.

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

After consideration of the arguments made and review of the evidence presented, the Appeals Board finds that claimant, as a result of repetitive use trauma to her wrist and shoulders sustained personal injury by accident arising out of and in the course of her employment culminating August 31, 1991, her last day of employment with the respondent. As a result of said injury claimant has sustained a sixty-five percent (65%) permanent partial work disability.

Claimant, a 41-year old resident of Clinton, Missouri, at the time of the first regular hearing, had subsequently relocated to Heathrow, Florida by the time of the completion of her regular hearing testimony. She claims injury to her right wrist and shoulders from repetitive use while working for respondent for the period beginning September 24, 1990, until approximately August 31, 1991. Respondent is a machine shop working on steel parts for the military. Claimant was a quality control inspector involved in the manufacturing process of shell parts for 120 millimeter bombs. She worked 8 to 10 hours a day, 6 days a week. Her job duties required her to inspect 200 to 300 pieces daily. The heavier part was called a boom tail. These weighed five pounds each. Inspection of these also required a twisting motion of the hands. She had to physically pick up these pieces to inspect, clean and measure the parts. In order to gauge the bomb parts she was required to work above shoulder level while standing on tiptoes to reach the gauge in the design cage. She then would screw the artillery shell onto a device that measured the threads. This required her to lift and reach with her arms and twist and grasp with her hand and wrist. There was a second type of part with which she regularly worked. The other part was called a fan and had six blades. The blade part weighed approximately one pound or less. She had to check the dimensions of each blade. She had to check a total of over 100 different dimensions. This required her to pick up the part and use a gauge on the surface. This likewise required a twisting motion.

Claimant is a small woman, 5'1" tall and weighing 115 pounds. She moved to this country from Taiwan as an adult. Chinese is her native language. She admits to having some problems with the English language which are apparent from a reading of her testimony but which did not rise to the level where an interpreter was deemed necessary.

Her physical problems started with her right arm and shoulder. She experienced a feeling of it being very heavy and tired. She was not able to pick up heavy objects. She described the right shoulder as having a feeling of tightness and a binding or pulling sensation that was very painful. It got progressively worse. She initially did not report this injury to respondent but instead sought treatment through her personal physician, a Dr. Johnson. When she first went to Dr. Johnson, she was having pain in both shoulders, primarily the right. He prescribed medication and subsequently injected the right shoulder with Cortisone on February 7, 1991. She informed her supervisor, Gary Carter, that she was going to her doctor to get a Cortisone shot for her shoulder. She further advised him

that the injury was work related. Claimant's recollection concerning the date of that conversation with her supervisor was it took place on about December of 1990. However, she also related it in time to the Cortisone injection given by Dr. Johnson. By that time both shoulders were bothering her as well as the right wrist and arm. Subsequent to her right hand starting to bother her, she started using her left hand more which caused it to start bothering her as well.

In February of 1991, Dr. Johnson gave her a splint for her wrist and recommended she not use her right hand. She continued to see Dr. Johnson until her treatment was changed to the company doctor, a Dr. Bono, in April of 1991. She received physical therapy and medication. She continued with her regular job duties until she was laid off at the end of August of 1991.

She was eventually referred to Dr. Joyce who treated her wrist with Cortisone injection. Later treatment was transferred by the respondent to Dr. Lowry Jones. Claimant has not worked since being laid off from her job with the respondent. During the pendency of this claim her husband died and she moved to Florida to be with her daughter. She describes her symptoms as essentially being the same now as they were at the time she was laid off from the respondent. Her right wrist becomes painful if she writes too much. The tendons are still swollen and she has difficulty opening jars. Twisting motion causes her wrist to hurt and she has difficulty holding objects such as a knife to cut food or utensils for cooking. Both shoulders continue to bother her, the right more than the left. It causes her pain to raise her arms above shoulder level. She feels a grinding and popping sensation and hears noise when she moves her arms. She does not think that there is any work that she is qualified to do. She cannot return to the type of work she performed for the respondent due to the lifting, grasping and twisting requirements as to the right hand and the required use of the arms above shoulder level. She does not think she can do secretarial work because of the limited use of her right hand for writing or typing. She has never worked as a secretary although she did have some training in accounting while in Taiwan, and in computer programming while in this country. She can only type 20 to 30 words per minute. She does plan to help with light bookkeeping in her daughter's dental office but she will only do this work part-time to the extent she feels able.

Claimant was examined at the request of her counsel on two occasions by Dr. Nathan Shechter, a board certified orthopedic surgeon. His examination revealed tenderness in both shoulders but without swelling or atrophy. Range of motion was normal but associated with pain with abduction and with internal and external rotation. Examination of the right wrist revealed tenderness. There was likewise no swelling and a normal range of motion. Finkelstein test was positive for inflammation of the abductors and extensor of the thumb. In the opinion of Dr. Shechter, claimant sustained bilateral tendinitis of the shoulders and deQuervain's tenosynovitis of the abductor and extensor of the right thumb. Both conditions were attributed to her work. He felt that she may require decompression surgery to both shoulders and wrist in the future. Dr. Shechter found claimant to have a five percent (5%) functional impairment of the right upper extremity due to the involvement of the right wrist which translates to a three percent (3%) to the body as a whole. This he combined with a seven and one-half percent (7½%) to the body as a whole due to the impairment of the right shoulder and a ten percent (10%) for the left shoulder for a total of nineteen percent (19%) to the body as a whole. He recommended restrictions of no lifting above shoulder level, and no repetitive motion of both upper extremities and the wrist. In his opinion she may require future medical treatment in the form of physical therapy, anti-inflammatory medication, further injections and perhaps surgery. Dr. Shechter defined repetitive motion as every hour. He opined that claimant

cannot do repetitive mobility by repeat abduction and excessive use of the arm. Activity of this sort is limited to once every hour. He further restricted her from lifting in excess of 50 pounds with only occasional lifts of 30 to 50 pounds from the floor. Lifting from table height was restricted to 20 pounds frequently, 30 pounds occasionally, and never above 30 pounds. Overhead lifting was limited to 10 pounds frequently and up to 20 pounds occasionally. Repetitive grasping of the right hand was restricted as well.

Respondent took the deposition of Dr. Lowry Jones, Jr., a board certified orthopedic surgeon. He diagnosed chronic impingement syndrome in both shoulders. In his opinion, arm activity by claimant above 90 degrees horizontal would cause interior shoulder pain. Although this condition allows a full range of motion it is with pain in a localized area that occurs from 90 degrees upward. He felt her complaints of wrist pain at the base of her thumb and around the area of her scaphoid were consistent with deQuervain's syndrome. In his opinion she did have bilateral impingement syndrome at the shoulders and dequervain's syndrome at the right wrist. In addition, she had a lot of crepitus in both shoulders which he did not consider significant as it was not painful at the time of his examinations. He considered the crepitus to be a condition separate and apart from the impingement syndrome although he related both conditions to the work and opined that both routinely have recurrence of symptomatology. Claimant was not working during the time Dr. Jones saw her.

Dr. Jones testified the significantly painful and aggravating maneuver for a person with impingement syndrome is lifting the arms above the shoulder level. Therefore, he would restrict claimant to limited activity above shoulder level. She should not do repetitive lifting above shoulder level. She should also limit motion of reaching across the body repetitively. He ascribed a fifteen percent (15%) permanent impairment for her chronic impingement syndrome in both shoulders and deQuervain's syndrome. This combined rating was arrived at by giving the right shoulder eight percent (8%), the left shoulder two percent (2%), and five percent (5%) for the wrist. This would translate to a nine percent (9%) whole body impairment. In his opinion she will definitely need future medical treatment. This could include anti-inflammatory medication, physical therapy, subacromial injections and injections for deQuervain's syndrome, and possible surgical treatment in the form of a subacromial decompression to the shoulder and decompression of the deQuervain's. He defined repetitive as 5 to 10 times per hour. This activity should also be limited by weight. She should limit lifting above shoulder level to 10 pounds at most. Working across her body, in other words reaching out or bringing something back to her, should likewise be limited to 10 pounds or less.

Expert vocational testimony was offered on behalf of claimant by Michael J. Dreiling, Director of the Return To Work Center of the Menninger Center, in Kansas City. He is a certified rehabilitation counselor with the Kansas Division of Workers Compensation. Mr. Dreiling interviewed claimant and obtained information concerning her educational background, work history, and experience. He also had medical records from Drs. Shechter, Bono, Phillips, and Jones. He utilized the restrictions imposed by Dr. Shechter taken together with the claimant's training and educational background, her employment background, transferrable job skills, the physical requirement of the jobs she had performed, and of those available in the open labor market to form an opinion as to the claimant's ability to access the open labor market and earn a comparable wage. Based upon these considerations, in his opinion her access to the open labor market has been reduced by seventy-five percent (75%). She would not be able to return to any of her prior jobs due to the restrictions against repetitive use of the upper extremities and repetitive grasping. He considered claimant to be capable of working in a limited range of jobs

earning \$5.00 per hour. This would translate to a loss of wage earning capacity of fifty-five percent (55%).

The test for determining permanent partial general disability is the extent, expressed as a percentage, to which the claimant's ability to perform work in the open labor market and the ability of the worker to earn comparable wages have been reduced, taking into consideration the employee's education, training, experience and capacity for rehabilitation. Hughes v. Inland Container Corp., 247 Kan. 407, 422, 799 P.2d 1011 (1990). While Hughes does not mandate the use of a specific formula to arrive at the exact percent of disability it does require consideration of the two factors stated above when computing the extent of permanent partial disability. Schad v. Hearthstone Nursing Center, 16 Kan. App. 2d 50, 52-53, 816 P.2d 409, rev. denied 250 Kan. 806 (1991).

The trier of facts' function is to decide which testimony is more accurate and/or credible and to adjust the medical testimony along with the testimony of the claimant and any other testimony that may be relevant to the question of disability. Tovar v. IBP, Inc., 15 Kan. App. 2d 782, 785-786, 817 P.2d 212 (1991).

The Appeals Board, as the trier of fact, has the ultimate decision concerning the extent and nature of disability and such decision must be based upon evidence presented in the record. The Appeals Board finds that the opinion of Michael J. Dreiling is supported by the credible evidence and further finds that even though said opinion is based solely upon the medical opinions of Dr. Shechter, without regard to the opinions of the other physicians, this testimony is essentially uncontradicted. The testimony of Dr. Jones with regard to diagnosis, restrictions and treatment essentially mirrors that of Dr. Shechter in the significant details. Uncontradicted evidence not found to be improbable or unreasonable will not be disregarded. Anderson v. Kinsley Sand & Gravel, Inc., 221 Kan. 191, 558 P.2d 146 (1976).

In order to arrive at a percentage of work disability, a mathematical equation or formula must necessarily be utilized. Hughes, supra at 422. While the statute is silent as to how the percentage is to be arrived at, the Appeals Board in this instance elects to adopt the formula set forth in Hughes. By averaging the seventy-five percent (75%) loss of labor market with the fifty-five percent (55%) loss of ability to earn a comparable wage, the Appeals Board finds the claimant has suffered a sixty-five percent (65%) permanent partial disability to the body as a whole from the work related injury.

### **AWARD**

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the claimant shall be awarded compensation for the injury suffered from December 1990, through August 31, 1991, and that claimant is entitled to a sixty-five percent (65%) permanent partial disability to the body as a whole therefrom.

The claimant is entitled to 415 weeks permanent partial disability to the body as a whole, at the rate of \$191.59 per week or \$79,509.85 for a sixty-five percent (65%) permanent partial general body disability making a total award of \$79,509.85.

As of May 6, 1994, there would be due and owing to the claimant 139.86 weeks permanent partial disability compensation at \$191.59 per week in the sum \$26,795.78 which is ordered paid in one lump sum less amount previously paid. Thereafter, the remaining balance in the amount of \$52,714.07 shall be paid at \$191.59 per week for 275.14 weeks or until further order of the Director.

The remaining findings and orders of Administrative Law Judge Robert H. Foerschler dated November 17, 1993, and the Order Nunc Pro Tunc Award dated December 6, 1993, not inconsistent with the findings and Award entered herein are otherwise approved and incorporated herein by reference.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of May, 1994.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

cc: John G. O'Connor, 827 Armstrong, Kansas City, Kansas 66101  
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Robert H. Foerschler, Administrative Law Judge  
George Gomez, Director